Filed 5/20/04 Mukathe v. Martin Luther King Jr. Hosp. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALEX MUKATHE, Plaintiff and Appellant, v. MARTIN LUTHER KING, JR. HOSPITAL et al., Defendants and Respondents.	B155251 (Los Angeles County Super. Ct. No. BC236041)

APPEAL from the judgments of the Superior Court of Los Angeles County. Owen Lee Kwong, Judge. Affirmed.

Law offices of Anthony O. Egbase & Associates and Anthony O. Egbase for Plaintiff and Appellant.

Stephan, Oringher, Richman & Theodora, Robert S. Cooper; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendants and Respondents.

Alex Mukathe appeals from the summary judgments entered on behalf of the five defendants in his job discrimination complaint. We affirm the judgments because Mukathe has not supplied an adequate record.

FACTS AND PROCEDURAL HISTORY[1]

Alex Mukathe worked as a financial analyst for Los Angeles County's King/Drew Medical Center.[2] Mukathe, who is Kenyan, sued the hospital for job discrimination and harassment based on his national origin. (Gov. Code, § 12940, subds. (a), (g).) He also sued four hospital employees—Leo Busa, Noma Crook, Barbara Gondo, and Anthony Gray.[3] Respondents each moved for summary judgment, motions which were granted on November 28, 2001. In its written order, the trial court found no evidence that Mukathe had been harassed or discriminated against, concluding instead that he had been treated the same as other employees. It also found that the individual defendants had not harassed or discriminated against Mukathe, that Mukathe's claims against them were barred by the statute of limitations, that Mukathe had failed to exhaust his administrative remedies, and that the employee respondents could not be individually liable for any discrimination by the hospital.

On appeal, Mukathe contends that the trial court erred: (1) by failing to continue the hearings on respondents' summary judgment motions pending the completion of certain discovery; (2) by not allowing his lawyer to argue at the hearing on the motions; (3) by entering judgment in favor of Crook after he had dismissed her from the action; and (4) by ignoring evidence which raised triable issues of fact concerning his claims.

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1 Because we affirm the judgments based on Mukathe's failure to provide an adequate record, our statement of the facts will not provide much detail about Mukathe's claims or the summary judgment motions.

2 We will refer to King/Drew Medical Center as "the hospital."

3 We will sometimes refer to the hospital and the four individual defendants collectively as "respondents."

Although respondents challenge all of these assertions, they also contend that Mukathe did not meet his burden of providing an adequate record for appellate review. As set forth below, we agree.

DISCUSSION

An appealed judgment is presumed to be correct, placing on an appellant the burden of providing us with an adequate record to support his claim that prejudicial error occurred. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2 [reviewing court is limited to matters contained in the record and without the proper record, the evidence is conclusively presumed to support the judgment]; *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.) Critical to our review of any summary judgment is the moving party's separate statement of undisputed facts. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Mukathe's original designation of the record did not include a request for any of respondents' five separate statements. Neither did his two later requests to augment the record, which were limited to respondents' reply briefs and his attempt to file a supplemental response to those documents, as well as certain deposition transcripts.[4] As a result, respondents' separate statements are not in the record.

Further complicating matters for Mukathe is the absence of the summary judgment motions filed by the hospital, Busa, Crook, and Gray. In his December 2001 designation of the record, Mukathe sought to include those documents. For reasons that do not appear from the record, none of those were included in the original clerk's transcript. Instead, the one motion he did not request—by Gondo—was included. Even though Mukathe has twice sought to augment the record, and despite respondents' reliance on the absence of these materials in their brief, Mukathe has never sought to augment the record to include the motions that led to the judgments he asks us to reverse. (See *People v.*

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[4] We granted Mukathe's first request to augment on December 13, 2002, which focused on respondents' reply briefs and his own supplemental responses to those documents. In July 2003, Mukathe moved to augment the record with certain deposition transcripts, a request which we hereby deny.

Preslie (1977) 70 Cal.App.3d 486, 491-492 [even where a request to augment, albeit an informal one, is made too late, it can properly be denied by the appellate court; failure of the parties to "promptly review the trial record upon receipt and, if indicated, to quickly move for augmentation results in unconscionable delays" due to time needed to prepare the record and by additional briefing to respond to it].)[5]

In short, despite the absence of the summary judgment motions and their accompanying separate statements of undisputed facts, Mukathe has taken no steps to have those documents added to the record. As a result, he has not met his burden of providing an adequate appellate record. (*Wyckoff v. Pajaro Valley Consolidated R.R. Co.* (1905) 146 Cal. 681 [on appeal from order granting new trial, order affirmed because appellant did not include the new trial motion in the record]; *Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 402 [although summary judgment for plaintiff was reversed on appeal, appellate court would not direct entry of summary judgment for defendant based on his competing motion; because defendant did not provide a copy of his motion or the opposition papers, he failed to supply an adequate appellate record]; *Pringle v. La Chapelle, supra,* 73 Cal.App.4th at p. 1003 [without a proper record, reviewing court cannot evaluate issues requiring a factual analysis].)

Our holding applies to more than just the merits of respondents' motions. It also applies to Mukathe's claim of procedural errors: the denial of his request for a continuance and the purported refusal to let him argue at the hearing on the motions. Even if error occurred, Mukathe is still obliged to show that the error was prejudicial. (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Because the summary judgment motions and separate statements are not in the record, it is

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5 Therefore, even if Mukathe were to seek augmentation of the record now, we would likely deny his request.

impossible for us to evaluate whether any error that might have occurred was prejudicial.[6]

Finally, Mukathe dismissed Crook with prejudice on November 5, 2001, four days after his opposition brief to her summary judgment motion was due. The trial court went on to rule in her favor, finding that Crook's moving papers established that Mukathe had failed to exhaust his administrative remedies. Relying on *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253 (*Cravens*), the court held that Mukathe's failure to oppose the motion justified granting summary judgment for Crooks. Mukathe contends that *Cravens* is inapplicable and that the judgment for Crooks must be reversed. He is wrong.

In *Cravens, supra,* 52 Cal.App.4th 253, the defendant filed a summary judgment motion. Instead of opposing the motion, the plaintiff dismissed the action without prejudice one day before the hearing on the motion. The trial court went ahead and granted summary judgment for the defendant. The court noted that the defendant's moving papers met the statutory requirements for shifting the burden to the plaintiff to rebut the showing and raise triable issues of fact. If the plaintiff failed to do so, the defendant was entitled to summary judgment as a matter of law. The trial court had discretion to grant summary judgment if the plaintiff did not file an opposition including a separate statement of disputed material fact not less than 14 days before the hearing on

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6 In connection with these claims, we note that on November 7, 2001, Mukathe brought an ex parte application seeking permission to deem his late-filed summary judgment oppositions as having been timely filed. According to his lawyer, the oppositions were late because he was waiting for the transcripts of recently completed depositions and had been unable to attach copies of the transcripts to the opposition briefs. In the alternative, he sought a continuance of the summary judgment hearing not because he needed to conduct more discovery, but in order to obtain new transcripts. The trial court declined to rule at that time, saying it would do so at the hearing on the motions. When ruling on the motions, the court said it had considered all of the parties' papers. As for the hearing on the summary judgment motion, although the court took the motions under submission without hearing oral argument, the court never said the parties were not allowed to argue and neither party asked to do so, despite the court's statement that "the hearing's today."

the motion. "Appellant failed to file opposition within the requisite time. At that point, entry of summary judgment in favor of respondents became a formality which appellant could not avoid by the stratagem of filing a last minute request for dismissal without prejudice." (*Cravens, supra,* at p. 257.) That is precisely what happened here. Although Mukathe contends that Crook's moving papers did not establish her right to judgment as a matter of law, his failure to include those papers in the record leaves us unable to evaluate his contention and compels us to affirm.[7]

DISPOSITION

For the reasons set forth above, the summary judgments in favor of all five respondents are affirmed. Respondents to recover their costs on appeal.

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RUBIN, J.

We concur:

COOPER, P.J.

FLIER, J.

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[7] Respondents also contend that we must dismiss the appeal, which was filed after the nonappealable order granting summary judgment was entered, but before the appealable judgment of December 14, 2001. We deem the notice of appeal as having been filed immediately after the entry of judgment and, therefore, timely. (*Allabach v. Santa Clara County Fair Assn.* (1996) 46 Cal.App.4th 1007, 1010.)